IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CGB OCCUPATIONAL THERAPY, INC., Plaintiff v. RHA/PENNSYLVANIA NURSING HOMES, INC., d/b/a Prospect Park Rehabilitation Center d/b/a Prospect Park Nursing Center d/b/a Prospect Health and Rehabilitation Residence RHA/PENNSYLVANIA NURSING HOMES, INC., d/b/a Pembrook Nursing and Rehabilitation Center d/b/a Pembrook Health and Rehabilitation Residence f/k/a West Chester Arms Nursing and Rehabilitation Center RHA HEALTH SERVICES, INC., SYMPHONY HEALTH SERVICES INC., SUNRISE ASSISTED LIVING INC., Defendants	:	CIVIL ACTION No. 00-4918

Newcomer, S.J. March , 2001

M E M O R A N D U M

Presently before this Court are plaintiff's Request for Entry of Default Judgment and Defendant Sunrise's Motion to Vacate Default Judgment. For the following reasons, plaintiff's Request for Entry of Default Judgment will be denied, Defendant Sunrise's Motion to Vacate Default Judgment will be considered as a Motion to Set Aside Default, said Motion to Set Aside will be granted, the Default entered against Defendants Sunrise and Symphony will be set aside, and this action will be stayed by

operation of law as to Defendant Symphony.

I. BACKGROUND

Plaintiff CGB Occupational Therapy, Inc. ("CGB") filed its Complaint against defendants Symphony Health Services Inc. and Sunrise Assisted Living Inc., and others, on or about September 28, 2000. Plaintiff's Complaint alleged claims for breach of contract, monies due for rental equipment, tortious interference with contractual relations, and conversion. According to plaintiff's Affidavit of Service of Complaint, filed January 25, 2001, Defendant Symphony was served with the Complaint at 7125 Ambassador Road, Baltimore, Maryland by Certified Mail, which was received on December 21, 2000, and Defendant Sunrise was served with the Complaint at 7902 Westpark Drive, McLean, Virginia by Certified Mail, which was received on December 20, 2000.[1]

Subsequently, W. Craig Knaup, counsel for Defendant RHA/Pennsylvania Nursing Homes, Inc., submitted a Stipulation for an Extension of Time to Submit an Answer to the Complaint.

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[1]Plaintiff's return receipt to Defendant Sunrise was signed by "TOTI ISAAC" on December 20, 2000. In his Affidavit, Isaac Toti states that he worked in the mailroom at Sunrise and that it was his standard practice to receive and sign for certified letters and forward it to the right recipient. In the event that a certified letter had come from an attorney's office or had a return address of a law firm, the letter would immediately go to the legal department - Ms. Susan Timoner's mailbox. Ms. Timoner, Sunrise's counsel, picked up her own mail, or had her assistant pick it up. Mail was picked up daily once or twice a day.

Although Attorney Knaup's signature was the only one on the Stipulation, Attorney Knaup represented to the Court in Paragraph 4 of the Stipulation that plaintiff's attorney, David S. Hope, had agreed pursuant to a telephone conversation on January 2, 2001 for an extension of two weeks to file an Answer to the Complaint.[2] On January 5, 2000, this Court issued an Order pursuant to the Stipulation extending the date by which defendants could answer the Complaint to January 22, 2001.

The RHA Defendants[3] filed their collective Answer through their attorney, Knaup on January 22, 2001. Up until February 1, 2001, however, Defendants Symphony and Sunrise had not filed their respective Answers, and plaintiff was forced to file its Request for Default and Default Judgment against those

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[2]Plaintiff's attorney, David G. Concannon, Esq., has now alerted the Court in plaintiff's Memorandum in Opposition to Defendant's Motion to Vacate Default Judgment that he has been informed that Attorney Hope "did not have a conversation with [Attorney] Knaup in which he agreed to an extension, and, if he had, he would have signed the stipulation Mr. Knaup filed with the court." Mr. Knaup has also asserted in Paragraph 4 of Defendant Sunrise's Motion to Vacate Default Judgment that Attorney Hope "agreed pursuant to a telephone conversation on January 2, 2001 for an extension of two weeks to file an Answer to the Complaint."

[3]"RHA Defendants" refers to the following defendants, collectively, RHA/Pennsylvania Nursing Homes, Inc., d/b/a Prospect Park Rehabilitation Center, d/b/a Prospect Park Nursing Center, d/b/a Prospect Health and Rehabilitation Residence, RHA/Pennsylvania Nursing Homes, Inc., d/b/a Pembrook Nursing and Rehabilitation Center d/b/a Pembrook Health and Rehabilitation Residence f/k/a West Chester Arms Nursing and Rehabilitation Center, and RHA Health Services, Inc.

two defendants. Default by Defendants Symphony and Sunrise for their respective failures to appear, plead or otherwise defend was entered on February 1, 2001.

On February 2, 2001, Attorney Knaup filed his Entry of Appearance on behalf of Defendant Sunrise, in addition to Defendant Sunrise's Answer to plaintiff's Complaint.[4] Four days later, on February 6, 2001, Defendant Sunrise filed the instant Motion to Vacate Default Judgment. On February 9, 2001, Defendant Symphony filed a Suggestion of Bankruptcy, indicating that on February 2, 2001, a Petition in Bankruptcy, Chapter 11, was filed by Symphony in the United States Bankruptcy Court for the District of Delaware, Docket No. 00-00793.

This Court is now in a unique procedural situation where it has pending before it a Request for Default Judgment, and a motion to vacate a default judgment that has yet to be entered. To add to the procedural complexities of this action, one of the defendants against which default has been entered, Defendant Symphony, has now petitioned for bankruptcy, statutorily staying this action with respect to it. In addition, plaintiff requests in its Supplemental Memorandum in Opposition to Defendant's Motion to Vacate Default Judgment that, if

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[4]Plaintiff notes, however, that Defendant Sunrise's Answer to plaintiff's Complaint, filed by Attorney Knaup, is substantially similar to the answer Mr. Knaup filed on behalf of the RHA Defendants on January 22, 2001, even containing the same spelling and typographical errors.

warranted, the Court should “levy an appropriate sanction against Mr. Knaup for his failure to fulfil his duties as an officer of the court,” and that the Court should “issue a rule to show cause why defendant’s counsel should not be sanctioned under Federal Rule of Civil Procedure 11" because “Mr. Knaup has undoubtedly failed to fulfill his obligation to conduct a reasonable investigation under Rule 11, and [because] he may have provided false information in violation of Pennsylvania law.”

II. DISCUSSION

A. PLAINTIFF’S REQUEST FOR ENTRY OF DEFAULT JUDGMENT AND DEFENDANT’S MOTION TO VACATE DEFAULT JUDGMENT

Originally, plaintiff requested a default judgment against Defendant Sunrise for a sum certain in the amount of $109,460.00. In light of Federal Rule of Civil Procedure 55(b)(1), the Clerk of Court should have entered said default judgment against Defendant Sunrise (and Defendant Symphony, for that matter) at the time plaintiff’s Request was filed - default had already been entered, and an affidavit of the amount due was attached to plaintiff’s Request. See Fed.R.Civ.P. 55(c)(1). However, it so happens that the Clerk did not enter default judgment; instead, the Request was forwarded to this Court’s Chambers. By the time the Court received the Request, Defendant Sunrise had filed an Answer to plaintiff’s Complaint and the Court had received a copy of defendant’s Motion to Vacate the Default Judgment.

Although plaintiff could very well have had default judgment entered in its favor on February 1, 2001, the Court would still have had to rule on the instant Motion to Vacate. Therefore, because default judgment has yet to be entered in this case against Defendant Sunrise, the Court will consider the plaintiff's Request for Entry of Default Judgment and Defendant Sunrise's subsequent Motion to Vacate Default Judgment simultaneously.[5]

1. ENTRY OF DEFAULT JUDGMENT

The entry of a default and default judgment is governed by Federal Rule of Civil Procedure 55, which reads in pertinent part:

> **(a) Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
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> **(b) Judgment.** Judgment by default may be entered as follows:
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> (1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been

[5]Because Defendant Symphony has filed for bankruptcy, an automatic stay is in place as to said defendant. However, in light of a recent stipulation between counsel for plaintiff and Defendant Symphony, the Court will vacate and set aside the Default against Defendant Symphony. Any reference to a request for default judgment from herein shall refer to being as against Defendant Sunrise, unless otherwise noted.

> defaulted for failure to appear and if he is not an infant or incompetent person.
>
> (2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor . . . .
>
> **(c) Setting Aside Default.** For good cause shown the court may set aside an entry of default . . . .

Generally, the entry of a default judgment is disfavored and the rules governing default judgments should be applied liberally because a default judgment prevents a plaintiff's claims from being decided on the merits. See United States v. $55,518.05 in United States Currency, 728 F.2d 192, 195 (3d Cir. 1984); Thompson v. Mattleman, Greenberg, Shmerelson, Weinroth & Miller, CIV.A. No. 93-2290, 1995 WL 321898, at *3 (E.D.Pa. May 26, 1995).

The Court is required to exercise sound judicial discretion in deciding whether to enter default judgment. See Harad v. Aetna Cas. and Sur. Co., 839 F.2d 979, 982 (3d Cir. 1988). "This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when the defendant is technically in default." 10 Wright, Miller & Kane, Federal Practice and Procedure § 2685. When exercising its discretion, the Court should consider a number of factors, including:

> the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in

> doubt. Furthermore, the court may consider how harsh an effect a default judgment might have; or whether the default was caused by a good-faith mistake or by excusable or inexcusable neglect on the part of the defendant. Plaintiff's actions also may be relevant; if plaintiff has engaged in a course of delay or has sought numerous continuances, the court may determine that a default judgment would not be appropriate. Finally, the court may consider whether it later would be obliged to set aside the default on defendant's motion, since it would be meaningless to enter the judgment as a matter of course if that decision meant that the court immediately would be required to take up the question of whether it should be set aside.

McCall v. R&J Taxi Company, CIV.A. No. 99-4955, 2000 WL 378060, at *1 (E.D.Pa. March 29, 2000)(quoting from 10A Wright, Miller & Kane, Federal Practice and Procedure § 2685, at 32-41 (3d ed. 1998)).

In light of the general policy disfavoring the entry of default judgment in favor of deciding claims on the merits, the Court will deny plaintiff's Request for Default Judgment. The Court notes that the following factors also favor the denial of plaintiff's Request: (1) the default is largely technical in this case; (2) plaintiff has not been substantially prejudiced by the delay of several weeks; (3) default judgment is a harsh sanction against a party for its attorney's negligence; (4) the default does not appear to have been caused by any intentional bad faith, but rather poor judgment and negligence; and (5) in light of the Motion to Vacate that has been filed, it would be meaningless to enter the judgment as a matter of course.

2. MOTION TO VACATE DEFAULT JUDGMENT / SETTING ASIDE DEFAULT

Although the Court does not have to rule on a Motion to Vacate Default Judgment, because there is no default judgment to vacate, it does have to deal with the default that has been entered against Defendant Sunrise. In order to do so, the Court will consider defendant's Motion to Vacate Default Judgment as a Motion to Set Aside Default pursuant to Rule 55(c).

Rule 55(c) permits the Court to set aside an entry of default if good cause is shown. See Fed.R.Civ.P. 55(c). In determining whether to set aside an entry of default, the Court must consider and make specific findings as to four factors: (1) whether the defendant has a meritorious defense; (2) whether the plaintiff would be prejudiced by vacating the default; (3) whether the default resulted from the defendant's culpable conduct; and (4) whether alternative sanctions would be effective. See Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987)(explaining standard for vacating default judgment); Feliciano v. Reliant Tooling Co. Ltd., 691 F.2d 653, 656 (3d Cir. 1982)(noting that the same factors apply when vacating an entry of default as when vacating default judgment). As in the case of default judgment, "[d]efault is not favored and all doubt should be resolved in favor of setting aside default and reaching a decision on the merits." 99 Cents Stores v. Dynamic Distrib., Civ.A. No. 97-3869, 1998 WL 24338 (E.D. Pa. Jan. 22, 1998). In

fact, less substantial grounds are adequate for setting aside a default than would be required for opening a judgment. See Feliciano, 691 F.2d at 656.

a. MERITORIOUS DEFENSE

In order to show the presence of a meritorious defense, defendant must come forth with allegations, which if proved at trial, would provide a complete defense to plaintiff's underlying claim. See United States v. A Single Story Double Wide Trailer, 727 F.Supp. 149, 151-52 (D.Del. 1989). The defendant is not required to establish the merit of its defense; rather, he must only offer a defense which, if successful at trial, would completely bar the action. See International Brotherhood of Electrical Workers, Local Union 313 v. Skaggs, 130 F.R.D. 526, 529 (D.Del. 1990). However, a general denial is insufficient to overturn a default; rather, the defendant must assert specific facts supporting the existence of a prima facie meritorious defense. See Cassell v. Philadelphia Maintenance Company, Inc., 198 F.R.D. 67, 69 (E.D.Pa. 2000)(citing $55,518.05 in United States Currency, 728 F.2d at 194-96).

Here, Defendant Sunrise raises numerous affirmative defenses. However, Defendant Sunrise's allegations in support of its defenses can be categorized only as minimal at best. In fact, defendant does not assert any specific facts to support the existence of a prima facie meritorious defense. Therefore, the

Court concludes that the first factor in demonstrating good cause militates against setting aside default.

b. PREJUDICE FOR PLAINTIFF

Prejudice occurs when relief would hinder the plaintiff's ability to pursue its claims through loss of evidence, increased potential for fraud, or substantial reliance on the default. See Feliciano, 691 F.2d at 657. Delay in realizing satisfaction on a claim rarely constitutes prejudice sufficient to prevent relief. See Feliciano, 691 F.2d at 656-57. Nor doe the fact that the plaintiff will be required to further litigate the action on the merits constitute prejudice. See Choice Hotels Int'l, Inc. v. Pennave Assoc., Inc., CIV.A. No. 98-4111, 192 F.R.D. 171, 2000 WL 133954, at *3 (E.D.Pa. Feb. 4. 2000).

In the instant case, the Court is not aware of, and plaintiff does not demonstrate, any prejudice that would occur if the default against Defendant Sunrise was to be set aside. The Court cannot imagine any hindrance to plaintiff's ability to pursue its claim through loss of evidence, increased potential for fraud, or substantial reliance on the default. Accordingly, the second factor favors setting aside the default entered against Defendant Sunrise.

c. CULPABLE CONDUCT

The third factor the Court must consider in setting

aside default is the defendant's culpability, that is whether the defendant showed excusable neglect. See Adena Corporation v. D'Andrea, CIV.A. No. 91-1202, 1997 WL 805265, at *2 (E.D.Pa. Dec. 30, 1997). A defendant exhibits culpable conduct if he fails to respond to the complaint willfully, in bad faith, or as part of trial strategy. See Skaggs, 130 F.R.D. at 529. The Third Circuit has used the following factors to guide its determination of a defendant's culpability: (1) whether the inadvertence reflected professional incompetence such as ignorance of rules of procedure; (2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court; (3) counsel's failure to provide for a readily foreseeable consequence; (4) a complete lack of diligence; or (5) whether the inadvertence resulted despite counsel's substantial good efforts towards compliance. See Adena, 1997 WL 805265, at *3 (citing Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (3d Cir. 1988)).

Defendant Sunrise's attorney, W. Craig Knaup, contends that Julian S. Myers, Vice President and Counsel for Defendant Sunrise, did not ask Mr. Knaup to be defense counsel for defendant until January 19, 2001 - 11 days after defendant's Answer was originally due, and just 3 days prior to the extended deadline for defendant's Answer. While Mr. Knaup argues that he was obligated under the Rules of Professional Conduct to speak

with Defendant RHA Health Services in order to represent Defendant Sunrise, the Court determine that as counsel of record for the RHA Defendants, he most surely was aware of the impending deadline for Defendant Sunrise's Answer.

The Court finds it shamefully negligent that neither Ms. Myers nor Mr. Knaup, both officers of the Court and knowing that a delay would arise from Defendant Sunrise's dilatory actions in obtaining counsel, would exercise the professional courtesies to alert plaintiff and this Court of the delay. The conduct of Defendant Sunrise and its counsel reflects professional incompetence, an easily manufactured excuse, failure to provide for a readily foreseeable consequence, a complete lack of diligence, and a lack of substantial good efforts towards compliance. The Court, therefore, finds that defendant's conduct was culpable here, and that said culpability weighs against setting aside the default against Defendant Sunrise.

d. ALTERNATIVE SANCTIONS

"It is well established that district courts have discretionary authority to determine the appropriate sanction for a particular case and to impose severe sanctions in cases it seems appropriate." Coastal Mart, Inc. v. Johnson Auto Repair, Inc., 196 F.R.D. 30, 34 (E.D.Pa. 2000)(citing National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639 (1976). However, a default and subsequent default judgment should be a

sanction of last, not first, resort, and courts should try to find some alternative. See Emcasco Ins. Co, 834 F.2d at 75. "Courts issue alternative sanctions in cases where they are troubled by the behavior of the party seeking to set aside the default." See Royal Insurance, 2000 WL 1586081, at *3 (citing American Telecom, Inc. v. First Nat'l Comm. Network, Inc., CIV.A. No. 99-3795, 2000 WL 714685, at *8 (E.D.Pa. June 2, 2000)). In addition, when determining the appropriate sanction to impose, "district courts are advised to seek the most direct route that is preferable and to avoid compelling an innocent party to bear the brunt of its counsel's dereliction." Coastal Mart, 196 F.R.D. at 34 (citing Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 869 (3d Cir. 1984)).

In this case, plaintiff's failure to allege any prejudice favors the setting aside of default. On the other hand, defendant's failure to present prima facie evidence of a meritorious claim, in addition to its culpable conduct, argues for letting the default stand. However, "courts in this circuit seem unwilling to deny [a] motion to set aside entry of default solely on the basis that no meritorious defense exists." Richard v. Kurtz, CIV.A. No. 98-5589, 1999 WL 1038334, at *3 (E.D.Pa. Nov. 8, 1999)(citations omitted). Although the lack of a meritorious defense is compounded by defendant's culpable conduct in the instant case, the Court determines that it would be

improper here to impose the drastic sanction of default against Defendant Sunrise.

Instead, the Court finds that an alternative sanction does exist, and will allow plaintiff to recoup the costs and fees related to the filing of its Request for Default Judgment and accompanying briefs. Plaintiff, therefore, shall be permitted to file a Petition for Attorney's Fees if it so desires. In light of this Court's desire to have this matter resolved on the merits and to minimize harm to an innocent party for an attorney's misconduct, the Court will grant Defendant Sunrise's Motion to Set Aside Default.

B. REQUEST FOR SANCTIONS

Federal Rule of Civil Procedure 11(b) states in relevant part that:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-
>
> (1) it is not being presented for any improper purpose, such a to harass or to cause unnecessary delay or needless increase in the cost of litigation . . .
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

Although the Court sympathizes with plaintiff's desire to have the Court levy a sanction against defendant's counsel Mr.

Knaup, or at least issue a rule to show cause under Rule 11, it will refrain from doing so at the present time. Plaintiff has not filed a formal Rule 11 Motion for Sanctions, and does not argue rigorously for any sanctions. However, the Court notes that Mr. Knaup's conduct, as noted above, has indeed been suspect. In particular, plaintiff has brought to the Court's attention several allegations that: (1) Attorney Knaup made misrepresentations concerning a conversation with opposing counsel in a stipulation filed with the Court, and (2) Attorney Knaup failed to fulfill his obligation to conduct a reasonable investigation under Rule 11 in making allegations in several of his moving papers.

The Court does not take such allegations of misconduct lightly and reprimands Mr. Knaup for any such misconduct. For the time being, however, unless and until plaintiff files a formal Motion for Rule 11 Sanctions with proper evidence supporting its allegations the Court denies plaintiff's request for sanctions or a Rule 11 show cause hearing.

AN APPROPRIATE ORDER FOLLOWS.

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Clarence C. Newcomer, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CGB OCCUPATIONAL THERAPY, INC., Plaintiff v. RHA/PENNSYLVANIA NURSING HOMES, INC., d/b/a Prospect Park Rehabilitation Center d/b/a Prospect Park Nursing Center d/b/a Prospect Health and Rehabilitation Residence RHA/PENNSYLVANIA NURSING HOMES, INC., d/b/a Pembrook Nursing and Rehabilitation Center d/b/a Pembrook Health and Rehabilitation Residence f/k/a West Chester Arms Nursing and Rehabilitation Center RHA HEALTH SERVICES, INC., SYMPHONY HEALTH SERVICES INC., SUNRISE ASSISTED LIVING INC., Defendants	:	CIVIL ACTION No. 00-4918

O R D E R

AND NOW, this day of March, 2001, it is hereby ORDERED as follows:

(1) Plaintiff’s Request for Entry of Default Judgment (Paper #7) is DENIED.

(2) Defendant Sunrise’s Motion to Vacate Default Judgment (Paper #10) is considered as a Motion to Set Aside Default, and said Motion to Set Aside is GRANTED.

(3) The Default entered against Defendant Sunrise on

February 1, 2001 is VACATED and SET ASIDE.

(4) Upon consideration of the Stipulation to Vacate Entry of Default between counsel for plaintiff and Defendant Symphony, it is ORDERED that the Default entered against Defendant Symphony on February 1, 2001 is VACATED and SET ASIDE.

(5) This action is STAYED by operation of law as to Defendant Symphony until such time as this Court should order otherwise, Defendant Symphony having filed a Suggestion of Bankruptcy, indicating that on February 2, 2001, a Petition in Bankruptcy, Chapter 11, was filed by Symphony in the United States Bankruptcy Court for the District of Delaware, Docket No. 00-00793.

Counsel for Defendant Symphony shall advise the Court on its status with respect to his action no less than every sixty days from the date of this Order.

(6) A Pretrial Conference in this action is ORDERED in Chambers on Thursday, March 22, 2001 at 3:15 p.m. Counsel for all parties, including Defendant Symphony, shall attend the Conference.

The purposes of this Conference are set forth in Fed.R.Civ.P. 16. The Court will assume that you will be fully prepared to comply with all provisions of Rule 16. The parties are, therefore, instructed to obtain authority to enter into stipulations, make admissions, and express evaluations in

accordance with the Rule. If the case is not a complex one, in the interest of conserving time and resources for counsel and their clients, counsel are invited to call Chambers to request that the Conference be held by telephone.

This Pretrial Conference will be continued only in extreme circumstances. If counsel are unable to attend, someone from counsel's office as familiar as possible with this case should attend.

(7) Plaintiff shall be permitted to file within 7 days of this Order a Petition for Attorney's Fees for those fees incurred in filing the Request for Default Judgment, including any briefing related to said Request. Defendant shall file objections to the Petition, if any, within 3 days of plaintiff's filing of the Petition.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, S.J.